Supreme Court, U.S.
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Docket No._____

IN THE SUPREME COURT OF THE UNITED STATES

GLENN R. WAITE,

v.

JUDGE PAUL D. EMPSON, et. al.,

On Petition For Writ of Certiorari to the Supreme Court of the State of Nebraska

---

PETITION FOR WRIT OF CERTIORARI

Respectively Submitted,

Glenn R. Waite,
Petitioner,
1591 S. Dandelion, #7
Pahrump, NV 89048
(775)-751-8592

39pp

QUESTIONS PRESENTED

1) Does the 14th Amendment allow the Nebraska Supreme Court and Nebraska Court of Appeals to (a) deny me access to the district court, in case 38270, in defense of any future contempt of court charges brought by Judge Empson or the county attorney; (b) deny me the opportunity for a hearing on the issues raised by Nancy Adam's special appearance filed in October 1994 and (c) give validity to the October 30, 1991 Order Nunc Pro Tunc which was rendered without prior notice and the opportunity for a hearing?

2) Did the Nebraska Supreme Court correctly overrule the petition for further review and thus correctly determine that the Nebraska Court of Appeals had correctly determined that any determination that Neb. Rev. Stat. sections 24-318 and 7-101 are repugnant to the U.S. Constitution would merely be advisory?

3) Did the Nebraska Supreme Court and Nebraska Court of Appeals correctly affirm that the district court could take judicial notice of facts outside the pleadings without prior notice and the opportunity for a hearing in violation of the 14th Amendment?

LIST OF ALL PARTIES

Appellant: Glenn R. Waite.

Appellees: Judge Paul D. Empson,
Judge Robert O. Hippe,
Judge Alfred J. Kortum,
Regional West Medical Center,
Nancy Adams,
Scottsbluff Internal
Medicine Group, and
W. Scott Carpenter.

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TO THE HONORABLE U.S. SUPREME COURT:

I most earnestly pray that you will grant my petition for writ of certiorari because the Nebraska Supreme Court and Court of Appeals in affirming that the district court properly sustained the demurrers and properly dismissed the action essentially denied me the federal right of having the opportunity for a hearing and final order on the special appearance (App. 94) filed in October 1994 by Nancy Adams alleging that I am engaged in the unauthorized practice of law in case 38270 which was not heard with the other cases on September 3, 1991 (App. 65) and in which no motion for summary judgment was ever filed.

The Nebraska Court of Appeals determined that any determination that Neb. Rev. Stat. section 24-318 and Neb. Rev. Stat. section 7-101 are repugnant to and violate the U.S. Constitution would merely be advisory. This determination was based on a previous appeal dismissed for lack of jurisdiction. This determination does not have any fair and substantial support in the court records because (1) a determination that section 24-318 is unconstitutional does not require a final order in a civil action; and (2) the facts alleged in the second amended petition show that there has never been a final order in case 38270 and the clerk's certification (App. 41) shows that there are pending motions not disposed of by the District Court.

Citations of the Official & Unofficial Reports of the Opinions and Orders in case number 44590 and in related cases.

Order of the Nebraska Supreme Court Overruling the Petition for Further Review on March 17, 1999.

Opinion of the Nebraska Court of Appeals on January 21, 1999.

Order dated September 2, 1997.

Order of Dismissal on April 30, 1997.

Orders of Dismissal for lack of jurisdiction on September 30, 1994 in cases A-94-765 and A-94-766.

Order by Judge Empson on October 25, 1996 in case 38269 in the District Court of Scotts Bluff County, Nebraska.

Statement of the Jurisdiction of this Court.

This Court has jurisdiction under Title 28 U.S.C. section 1257. Pursuant to Rule 13.1 of the U.S. Supreme Court Rules effective October 2, 1995, this petition is timely because the judgment or order sought to be reviewed was filed January 21, 1999 from the Nebraska Court of Appeals and this decision was subject to discretionary review by the Nebraska Supreme Court which overruled Appellant's Petition for Further Review on March 17, 1999.

The constitutional provisions, treaties, statutes, ordinances and regulations involved in the case.

Article III, section 2, of the U.S. Constitution states:

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;- to all Cases affecting Ambassadors, other public Ministers and Consuls;- to all Cases of admirality and maritime Jurisdiction;-to Controversies which the United States shall be a Party;- to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States,-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Article IV, section 2, of the U.S. Constitution states:

> "Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Article VI in addition to, and amendment of, the U.S. Constitution states:

> "In all criminal prosecutions, the accused shall enjoy the rights to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense."

Article XIV in addition to, and amendment of, the U.S. Constitution states:

"**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 U.S.C. section 1257:

"Final judgments or decrees rendered by the highest court of a State in which the decision could be had, may be reviewed by the Supreme Court as follows:

"...."(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution,

> treaties or statutes of, or commission held or authority exercised under, the United States."

Neb. Rev. Stat. section 24-318 (Reissue 1995) states:

> "**Offenses at trial; orders to investigate, to prosecute; duty of county attorney.** Every judge of the district court, when it appears that any offense has been committed in connection with the trial of any cause, shall direct the county attorney to make a complete investigation, and to report to the judge fully and expeditiously the result of that investigation. If convinced that the interests of justice require, the judge shall direct that such report be made in writing and filed with the clerk of the district court and by him made a part of the records of the court. If the judge is satisfied that further action should be taken, he shall direct the county attorney to prosecute the party or parties who appear to have committed the offense, and it shall be the duty of the county attorney thereupon to proceed promptly with such prosecution. The county attorney in such proceedings may file an information verified on information and belief; Provided, where the judge is himself satisfied from what has occurred in the trial that a prosecution should be instituted, it shall be his duty to promptly order it without waiting for an investigation by the county attorney."

Neb. Rev. Stat. section 7-101 (Reissue 1997) states:

> "**Unauthorized practice of law; penalty.** Except as provided in section 7-101.01, no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record in this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding. It is hereby made the duty of the judges of such courts to enforce this prohibition. Any person who shall violate any of the provisions of this section shall be guilty of a Class III misdemeanor, but this section shall not apply to persons admitted to the bar under preexisting laws."

Neb. Rev. Stat. section 7-110 (Reissue 1997) states:

> "**Parties acting in their own behalf.** Plaintiffs shall have the liberty of prosecuting, and defendants shall have the liberty of defending, in their proper persons."

Statement of the Case.

Background

This is an appeal from case 44590 filed by myself requesting the State District Court to declare my individual rights under the U.S. Constitution in regard to cases 38270 and 38279. Both cases were assigned to judge Hippe (App.108) whose wife had a pecuniary interest in the cases (App. 53). Case 38270 was not heard with the other cases on September 3, 1991 and no order of dismissal on the merits was ever rendered in that case (App. 107-113). Regional West Medical Center, in case 38270, filed a motion to strike and to dismiss on July 19, 1991 which requested further orders (App. 82). However, on December 9, 1993, judge Hippe denied all motions requesting further orders including the July 19, 1991 motion (App. 113). Subsequent to the December 9, 1993 order by judge Hippe, Nancy Adams, R.N. filed a special appearance raising the issue of alleged unauthorized practice of law (App. 94). There has been no hearing on this motion and that pleading has never been disposed by the court (App. 58). In case 38279, there has been no order disposing of the March 21, 1994 motion or petition (App. 100) to vacate the December 9, 1993 order (App. 44). There is no adequate remedy in cases 38270 and 38279 because if I file pro se pleadings in defense of the pleadings filed by the defendants, I will be threatened with contempt of court or criminal charges (App. 46).

One wrongful death action and four survival actions were filed by myself in the District Court of Scotts Bluff County, Nebraska. Also, one common law fraud

action was filed which alleged fraud against me individually by Dr. Carpenter and nurses at Regional West Medical Center. The survival actions were distinct cases involving different defendants and could not be joined under Nebraska law. Case 38267 alleged negligence in regard to the diagnosis and treatment of polymyositis. Case 38268 alleged negligence in regard to the diagnosis and treatment of central pontine myelinolysis. Case 38269 alleged fraud against me. Case 38270 alleged battery by nurses (App. 114). Case 38271 was a wrongful death action. Case 38279 alleged negligence in treating chronic hyponatremia. The survival actions were estate assets and were distributed to me by the County Court of Sheridan County, Nebraska, on May 15, 1996 (App. 47). In cases 38270 and 38279, a substitution of parties had been filed on December 7, 1993. There were pleadings filed by both the defendants and the plaintiff after December 7, 1993 and up to October 1996. I filed repeated motions requesting a hearing on the pending motions (App. 95). The court ignored my requests for a hearing and refused to entered a final appealable order on the pleading filed by Nancy Adams. On October 25, 1996, in case 38269, defendant Judge Empson noted that a substitution of parties had not been filed in case 38269 (but failed to note that there had been a substitution of parties filed in cases 38270 and 38279) and entered an order stating that if Glenn R. Waite, filed any more pleadings, pro se, in cases 38270 and 38279, the clerk of court was to notify the county attorney and the county attorney was to prosecute Glenn R. Waite for contempt of court and

criminal charges (App. 46). On October 25, 1996, when Judge Empson ordered me to stop filing pro se pleadings in cases 38270 and 38279, there were motions involving my personal rights which the court had not disposed of. Since I was not permitted to file any further pleadings in cases 38270 and 38279 without the threat of criminal prosecution, I filed case 44590 on January 21, 1997 requesting the court to declare that there had been no final appealable order in cases 38270 and 38279 directed against my individual rights and to declare that N.R.S. sections 24-318 and 7-101 are unconstitutional as applied to me personally by the defendants.

The Federal Question of Whether Neb. Rev. Stat. sections 24-318 and 7-101 are Unconstitutional was Raised in and Determined against Petitioner by the District Court.

Petitioner's second amended petition (App. 56, 68) states:

> "Plaintiff claims that, pursuant to Article IV, and the 5th and 14th Amendments to the U.S. Constitution, Neb. Rev. Stat. section 24-318 (Reissue 1995) is overbroad and is repugnant to and violates the U.S. constitution because it does not permit a notice and the opportunity for a hearing before an impartial decision maker to this Plaintiff before the judge directs that the county attorney's written report is filed with the clerk of the district court and by him made a part of the records of the court in the action." and "Glenn R. Waite, individually, claims that (1) pursuant to Article IV

and the 1st, 5th, and 14th Amendments to the U.S. Constitution, Neb. Rev. Stat. section 7-101 (Reissue 1991) is repugnant to and violates the United States Constitution because it commands a state judge to stop the filing of pleadings or other papers in a proceeding or action, i.e. a litigant's right of access to the courts, without compliance with Article IV and Amendments one, five, and fourteen of the U.S. Constitution to legally determine if the person who signed the pleadings or papers is in fact a party to the action or proceeding; and (2) the Order of Complete Settlement and Distribution filed in the County Court of Sheridan County, Nebraska on May 15, 1996 which determined that Glenn R. Waite, individually, is the sole heir and sole distributee of the decedent's estate, is res judicata, **not** the Court of Appeals decision in Waite v. Carpenter, 1 Neb. App. 321, on the issue of whether Glenn R. Waite, individually, is a "party to the action or proceeding" in cases 38270 and 38279 filed in the Scotts Bluff County District Court."

The Federal Question of Whether the District Court can take Judicial Notice of Facts Outside the Pleadings Without Prior Notice and the Opportunity for a Hearing was Raised in and Determined by the District Court

The supplemental motion to vacate (App. 78) states:

"a. the Court conducted its own ex parte investigation of the facts and considered its own evidence

> outside the pleadings and failed to provide this plaintiff with a.....notice and opportunity for a hearing pursuant to.....the 14th Amendment to the U.S. Constitution....."

The order dated April 30, 1997 (App. 12) states:

> "IT IS THEREFORE ORDERED, that all defendants' general demurrers are sustained. Petitioner shall not be allowed to attempt to amend further. This action is dismissed with prejudice at petitioner's costs."

The order dated September 2, 1997 (App. 7) states:

> "IT IS THEREFORE ORDERED, that all forms of relief requested in all of petitioner's post-dismissal filings are denied."

The Federal Questions of Whether Neb. Rev. Stat. sections 24-318 and 7-101 are Unconstitutional and Whether the Court can take Judicial Notice of Facts without Prior Notice was Raised in and Determined against Petitioner by the Nebraska Court of Appeals.

The Opinion of the Nebraska Court of Appeals on Janaury 21, 1999 (App. 5) states:

> "Waite's first and fourth causes of action seek a declaration that 24-318 and 7-101 were unconstitutional as applied to him in district court cases 38270 and 38279. As discussed above, the dismissals in 38270 and 38279 are final and the district court cannot reopen or relitigate those cases.

> Thus, a determination that 24-318 and 7-101 are unconstitutional would have no effect on those cases and would merely be advisory."

The Federal Question of Whether Neb. Rev. Stat. sections 24-318 and 7-101 are Unconstitutional and Whether the Court can take Judicial Notice of Facts without Prior Notice was Raised in and Determined against Petitioner by the Nebraska Supreme Court.

The petition for further review (App. 14) states:

> "The Court of Appeals erroneously concluded that a determination that sections 24-318 and 7-101 are unconstitutional would have no effect on cases 38270 and 38279 and would merely be advisory. The Court of Appeals had no jurisdiction to consider the constitutionality of statutes."

The Order dated March 17, 1999 (App. 1) states:

> "Petition for further review overruled".

Direct and concise argument.

SUMMARY

This Court has jurisdiction because a federal right or immmunity was denied me and it is obvious that the Nebraska Supreme Court and Court of Appeals tried to avoid determining a federal question by putting forth state grounds which do not have any fair or substantial support. The state grounds are without fair or substantial support because the first cause of action does not depend on a final order in cases 38270 and 38279 since

contempt of court or criminal charges can be brought regardless of whether there is a final order in the civil action. In case 38270, there has not been a final order which disposed of all issues precluding me from raising the federal question of whether Neb. Rev. Stat. section 7-101 (1997) is repugnant to and violates the U.S. Constitution as applied to me personally. This Court has jurisdiction to decide for itself whether there is a final order in case 38270 broad enough to preclude reaching the federal question of whether N.R.S. sections 24-318 and 7-101 are repugnant to and violate the U.S. Constitution as applied to me personally.

This Court should take jurisdiction because (1) it is in the public interest to protect the judiciary against a judge who seeks to determine a case for his spouse who is financially interested in the case and (2) it is in the public interest to allow a person to challenge the constitutionality of a state statute when he has been threatened by a state official with criminal charges.

THIS COURT HAS JURISDICTION AND SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND AND IT IS IN THE PUBLIC INTEREST TO GRANT MY PETITION.

Standards for Review

The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is a federal question, which the U.S. Supreme Court reviews de novo. Howlett v. Rose, 496 U.S. 356, 110 LEd 2d 332 at 340, 110 S. Ct. 2430 (1990). If the

judgment sought to be reviewed is supported by an adequate and independent state substantive ground, the Supreme Court has no jurisdiction; Henry v. Mississippi, 379 U.S. 443, 13 L Ed2d 408, 85 S Ct 564 (1965). However, a state court cannot, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the United States, if the federal right or immunity was specially set up or claimed which, if recognized and enforced, would require a different judgment; Chicago, B. & Q. R. Co. v. Illinois, 200 U.S. 561, 50 L Ed 596, 26 S Ct 341 (1906). This Court looks at prior decisions by the state courts to see if the state court is making an interpretation of state law with a specific intent to deprive a litigant of a federal right; Williams v. Georgia, 349 U.S. 375, 99 L Ed 1161, 75 S Ct 814 (1954). A state court may not avoid deciding federal questions, and thus defeat the jurisdiction of the United States Supreme Court, by putting forward nonfederal grounds of decision which are without any fair or substantial support. Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, the United States Supreme Court must determine for itself the sufficiency of the allegations and is not concluded by the view taken of them by the state court; Staub v. Baxley, 355 US 313, 2 LEd2d 302, 78 S.Ct. 277 (1957).

This Court must independently determine whether the decision of the Nebraska Court of Appeals and Supreme Court rests on an adequate and independent state substantive ground. The state ground which the state court put forth precluding litigation of a federal question is that in a previous appeal dismissed for lack of jurisdiction, the Court of Appeals determined, inter alia, that there has been a final order in cases 38270 and 38279. However, this determination does not have fair and substantial support because (1) whether or not there is a final order in these cases is irrelevant to any determination that section 24-318 is unconstitutional, and (2) the second amended petition clearly alleges facts that there has been no final order in case 38270 (App. 57) and there is no final order either sustaining or overruling Nancy Adam's special appearance (App. 58) which raises the issue of an alleged unauthorized practice of law (App. 94).

Under Nebraska law, when a petition contains more than one count, and a general demurrer is directed against the entire pleading, and is not limited to a particular cause of action, if either count is sufficient, the demurrer must be overruled; Alexander v. Thacker, 30 Neb. 614, 46 N.W. 825 (1890). It is a well-settled rule of law that where several defendants join in a general demurrer to a petition which states a cause of action as to one of them, the demurrer will be overruled; Missouri Valley Land Co. v. Bushnell, 11 Neb. 192, 8 N.W. 389 (1881). If it appears from the facts stated in petition that plaintiff is entitled to any relief, general demurrer will not lie; Sanitary and Imp. Dist. v.

Elkhorn, 248 Neb. 486, 536 N.W.2d 56 (1995). General demurrer admits all allegations of fact which are issuable, relevant, material, and well pleaded; Christopherson v. Christopherson, 177 Neb. 414, 129 N.W.2d 113 (1964). In considering demurrer, court must assume that pleaded facts, as distinguished from legal conclusions, are true as alleged and must give pleading benefit of any reasonable inference from facts alleged, but cannot assume existence of facts not alleged, make factual finding to aid pleading, or consider evidence which might be adduced at trial. In determining whether cause of action has been stated, petition is to be construed liberally, and if as so construed petition states cause of action, demurrer based on failure to state cause of action is to be overruled; Pilot Inv. Group Ltd. v. Hofarth, 250 Neb. 475, 550 N.W.2d 27 (1996). In ruling on demurrer, evidence cannot be considered. A demurrer must be determined only from the facts stated on the face of petition; Hynes v. Hogan, 251 Neb. 404, 558 N.W.2d 35 (1997). It is only when Res Judiciata affirmatively appears to exist from the petition itself that it affords a basis for sustaining a demurrer; Card v. Card, 174 Neb. 124, 116 N.W.2d 21 (1962); Tedco Dev. Corp. v. Overland Hills, Inc., 205 Neb. 194, 287 N.W.2d 49 (1980). In this case, the defendants filed general demurrers directed to the entire petition. Specifically, the demurrer of Regional West Medical Center, Nancy Adams, Scottsbluff Internal Medicine Group and W. Scott Carpenter stated: "The second amended petition fails to state facts sufficient to set forth a justiciable controversy" and the demurrer of Judges

Empson, Hippe, and Kortum stated: "the Second Amended Petition does not state facts sufficient to constitute a cause of action against said defendants". As set forth in Alexander, supra, 46 N.W. at 825, if either the first or fourth causes of action which raise a federal question is found to be sufficient to entitle plaintiff to any relief as to any one defendant, the general demurrers must be overruled.

The decision of the Nebraska Court of Appeals (App. 5) and Supreme Court (App 1) does not have fair and substantial support because the issue of whether or not there is a final order in cases 38270 and 38279 is irrelevant to my obtaining relief based on the first cause of action. Contempt of court or criminal charges can be brought regardless of whether there is a final order in a civil case. Judge Empson's order dated October 25, 1996 (App. 46) threatens Glenn R. Waite with contempt of court or criminal prosecution if he files any further pleadings, pro se, in cases 38270 and 38279. Neb. Rev. Stat. section 7-110 (Reissue 1995) allows plaintiffs and defendants to appear in their proper persons; State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986). If I file further pleadings, pro se, and Judge Empson starts a criminal prosecution against me, I am entitled under the U.S. Constitution to file a pro se defense to those criminal charges. This Court stated that a person's liberty is equally protected under federal law even when the liberty itself is a statutory creation of the State and the right of access to the courts is founded in the due process clause and assures that no person will

be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights; Wolff v. McDonnell, 418 US 539, 558, 579, 41 L.Ed2d 935, 94 S.Ct. 2963 (1974). This Court in Steffel v. Thompson, 415 US 452, 39 L.Ed2d 505, 94 S.Ct. 1209 (1974) held that when a state or county government official threatens a U.S. Citizen with criminal prosecution and the threats cannot be characterized as imaginary or speculative, and the plaintiff files an action challenging the constitutionality of the state statute, this presents an actual controversy under the Article III of the U.S. Constitution. In Johnson v. Mississippi, 403 US 212, 29 L.Ed2d 423, 91 S.Ct. 1778 (1971), this Court held that instant action to punish for contempt is proper where misbehavior occurs in presence of the judge and where corrective steps are needed to restore order, but if some of the essential elements of contempt are not personally observed by the judge, so that he must depend upon statements made by others about those essential elements, due process requires that the alleged contemptor be accorded notice and a fair hearing. In Re Oliver, 333 US 257, 92 L.Ed 682, 68 S.Ct. 499 (1948), this Court held that due process requires that an accused be given a public trial after reasonable notice of the charges against him, call witnesses on his behalf, and be represented either by counsel or "pro se". In Re Murchison, 349 US 133, 99 L.Ed 942, 75 S.Ct. 623 (1955), this Court held that a trial on contempt of court charges conducted before a judge with an interest in the case violates due process.

Contempt of court or criminal charges can be brought regardless of whether there is a final order in a civil action and I am entitled under federal law to file "pro se" pleadings in defense to any report or charges brought by judge Empson or the county attorney. Since the first cause of action does not depend on whether there has been a final order in cases 38270 and 38279 and since the first cause of action entitles me to some relief, the state court's decision does not rest on an adequate and independent state ground and this court has jurisdiction. This Court should grant certiorari because pursuant to Steffel, supra, 415 US at 459, I should not be obligated to first expose myself to actual arrest or prosecution in order to challenge a statute that deters the exercise of my constitutional rights.

This Court could grant certiorari based solely on the fact that the first cause of action entitles me to some relief, but since the Nebraska Supreme Court and Court of Appeals also held that any determination that N.R.S. section 7-101 is unconstitutional would be advisory, I will discuss that issue also.

The fourth cause of action (App. 63) incorporates the fact allegations in paragraphs one to twenty-one of the second amended petition and alleges facts showing that Neb. Rev. Stat. section 7-101 is unconstitutional and repugnant to the U.S. Constitution as applied to Glenn R. Waite in case 38270 and alleges that there has not been any final order in case 38270 because the court has not disposed of all issues. Nancy Adams in her demurrer claimed "the second amended petition fails to state facts sufficient to set forth a justiciable controversy". However,

paragraph 15 of the second amended petition (App. 58) states: "There is absolutely **no** order contained in the court records which disposes of the defendant's "notice of irregularily issued summons and special appearance in the alternative" filed October 11, 1994...". Nancy Adams' pleading filed on October 11, 1994, inter alia, states: "All filings by the plaintiff are void and a nullity since the plaintiff is engaged in the unauthorized practice of law." (App. 94). In response to that pleading, in case 38270, I am entitled, under the 14th Amendment, to my day in court under the 14th Amendment. The Court of Appeals claimed that its September 30, 1994 order determined, inter alia, that there was a final order in case 38270. Since Nancy Adams' pleading was filed after September 30, 1994, it is obvious the Court of Appeals' decision on January 21, 1999 does not have any fair or substantial support in the court records. By determining that case 38270 is final in regard to Nancy Adams' October 11, 1994 pleading, the Nebraska Court of Appeals is depriving me of an opportunity for a hearing which is guaranteed by the 14th Amendment and if her pleading is sustained in her favor, I am entitled under the Equal protection clause to a final appealable order. It is quite clear that the final outcome of this case depends on the determination of a federal question. This Court in Mullane v. Central Hanover B. & T. Co., 339 US 306, 314, 94 L.Ed 873 (1949) held that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under all circumstances, to appraise interested parties of the

pendency of the action and afford them an opportunity to present their objections. This Court further stated that there is no doubt that at a minimum the Due Process Clause requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case.

The opinion of the Court of Appeals does not have any fair or substantial support in the court records. That opinion (App. 5) states:

> "Waite's first and fourth causes of action seek a declaration that sections 24-318 and 7-101 were unconstitutional as applied to him in district court cases 38270 and 38279. As discussed above, the dismissals in 38270 and 38279 are final and the district court cannot reopen or relitigate those cases. Thus, a determination that section 24-318 or 7-101 are unconstitutional would have no effect on those cases and would be merely advisory."

The opinion of the Court of Appeals held that the law-of-the-case doctrine barred the district court from reopening, reviving, and relitigating case 38270 and that in its case A-94-765, it had determined that the prior orders in case 38270 were final and had finally disposed of all issues in that case. In Southern Railway Co. v. Clift, 260 US 316, 319 (1922), this Court held that a decision of a state court disposing of a federal question by following its decision on a former appeal as the law of the case, cannot be regarded as resting on the independent, non-federal ground of res judicata. In Christianson v. Colt

Industries Operating Corp., 486 US 800, 100 LEd2d 811, 108 S.Ct. 2166 (1988), this Court held that the doctrine of the law of the case cannot bind the United States Supreme Court and a petition to the Supreme Court for a writ of certiorari can expose the entire case to review.

The opinion of the Nebraska Court of Appeals (App. 3) states:

> "Waite's second and third cause of action sought a declaration that no final order had been rendered in district court cases 38270 and 38279. These cases were previously before us in A-94-765 and A-94-766, respectively, and we now take judicial notice of those files. A review of those records reveals that the appeals were dismissed by this court for lack of jurisdiction under Neb. Ct. R. of Prac. 7(A)(2) (rev.1996). While our summary order, as allowed by rule 7(A)(2), was abbreviated and did not contain the underlying rationale for the dismissals, a review of our records establishes that the dismissals were based in part on a determination that final orders had been entered in each of those cases long before the filing of those appeals and that Waite had not timely appealed from those prior orders."

What is stated here is absolutely false. This Court should not be tricked by the Nebraska Court of Appeals and should determine for itself whether there is any final order in cases 38270 and 38279.

Rule 7A(2) of the Neb. Ct. R. of Prac. states:

> "When the court determines it lacks jurisdiction the appeal will be

dismissed in the following manner: "APPEAL DISMISSED. See Rule 7A(2)."

The order dated September 30, 1994 in case A-94-765 (App. 39) states:

> "Misc. Submissions to Court-Jurisdiction filed 09/22/94 has been reviewed by the court and the following order entered: Appeal dismissed. See Rule 7A(2)".

The Misc. Submissions to Court-Jurisdiction filed on 09/22/94 was the Clerk's Certification. This Certification (App. 41) states:

> "The record herein does not contain any ORDER FOR HEARING in regard to the Motion to Strike and Dismiss filed by Defendants on July 19, 1991; nor does it contain any JOURNAL ENTRY indicating that the court heard this Motion. The record herein does not contain any MOTION filed by the Defendants requesting any Order Nunc Pro Tunc; nor does the record contain any JOURNAL ENTRY indicating that the court heard such a motion."

Though it cannot be shown in the appendix here, there is a stamp on the document showing it was filed in the Nebraska Supreme Court on September 22, 1994. Now over 4 years later, when this case presents a federal question which could change the whole outcome, the Nebraska Court of Appeals, in order to avoid determining a federal claim, wants to change its prior dismissals of cases A-94-765 and A-94-766 to be something other than a dismissal for lack of jurisdiction. The Second Amended Petition clearly alleges that Nancy Adams' pleading was filed in case 38270 on October 11, 1994 and has never been disposed of (App. 58). It also clearly alleges that the my

motion dated March 21, 1994 in case 38279 has never been disposed of (App. 62).

The record must be examined to see if there is in fact a final order in these cases. The second amended petition (App. 57,64) raises the validity of the December 9, 1993 Memorandum Decision and states:

> "The "memorandum decision" dated December 9, 1993 was signed by defendant, Hippe, when there was a pending motion to recuse him, and is merely an order sustaining a special appearance..." and "On April 8, 1991, case 38270 was filed. On April 11, 1991, case 38279 was filed. The cases were assigned to defendant, Hippe, who has **not** certified his disqualification in the cases and there is **no** waiver permitting him to preside in the cases. The motions to recuse him have not been disposed of by the Court."

Whether there is any order disposing of the motion to recuse Judge Hippe "prior to the December 9, 1993 order" overruling my motion to vacate the October 30, 1991 Order and the September 5, 1991 order is an actual controversy and crucial issue because (1) under Nebraska law when the facts of a judge's disqualification appears in the court record, any orders made by the judge after this time are absolutely void and may be collaterally attacked; Harrington v. Hayes County, 81 Neb. 231, 115 N.W.2d 773 (1908); and (2) under federal law, an accused is entitled to a neutral and detached judge in the first instance and it is of no constitutional relevance that petitioner could later be tried de novo in a higher court; Ward v. Monroeville, 409 US 57, 34 L.Ed2d 267, 93 S.Ct. 80 (1972).

A void order is, in legal effect, nothing. All acts performed under it, and all claims flowing out of it, are void; Hayes County v. Wileman, 82 Neb. 669, 118 N.W. 478 (1908). When an affidavit is filed to disqualify a judge, that judge can only rule on the legal sufficiency of the motion and affidavit. If the motion and affidavit is found to be legally sufficient, that judge must refer the matter to another judge who is to determine the truth of the statements contained in the motion; Berger v. United States, 255 US 22, 65 L.Ed 481 (1920). In Johnson, supra, 403 US at 216, this Court held that a trial before an unbiased judge is essential to due process under the U.S. Constitution.

The Court of Appeals in determining whether the demurrers were correctly sustained were obligated to treat as true the fact allegation that there had been no order disposing of the motion to recuse Judge Hippe prior to his December 9, 1993 order. The motion to recuse Judge Hippe was filed on November 2, 1993 which was prior to his December 9, 1993 order. The motion to recuse him was on the basis that he had had an ex parte communication with attorney Snowden on October 28, 1991 involving the merits of the dismissal order dated October 30, 1991 (App. 89). Under Nebraska law, a Judge must recuse himself when the ex parte communication poses a threat to the judge's impartiality; State v. Lotter, 355 Neb. 456, 586 N.W.2d 591 (1998). Since Judge Hippe did not recuse himself or rule on the legal sufficiency of my motion to recuse him prior to December 9, 1993, the December 9, 1993 orders signed by him are absolutely void under 14th Amendment

which requires a prior notice of any motion nunc pro tunc and requires a neutral and detached judge in the first instance on my motion to vacate the October 30, 1991 order.

The opinion of the Court of Appeals states that I filed a motion for new trial in response to the December 9, 1993 order and that motion was overruled on March 1, 1994 and no appeal was taken to that order (App. 4). However, the March 1, 1994 order is not a final order in case 38270. Paragraph 15 of the second amended petition (App.57) states: "The "memorandum decision" dated December 9, 1993.....is merely a special appearance and is **not** a final appealable order.". Paragraph 15 (App. 58) also states: "the order overruling the motion for new trial dated March 1, 1994 which was directed to a nonfinal "memorandum decision" is a nullity." Under Nebraska law, the overruling of a motion for new trial is not a final order when there has been no previous trial which affects the substantial rights of the parties or when the court leaves some issue as revealed by the pleadings open to future consideration. It is simply a request to reconsider an interlocutory order; Jarrett v. Eichler, 244 Neb. 310, 506 N.W.2d 682 (1993); Wicker v. Vogel, 246 Neb. 601, 521 N.W.2d 907 (1994). Whether the December 9, 1993 order was final and disposed of all issues in the case including my individual rights which are distinct from my personal representative rights and precluded a future action challenging the constitutionality of a state statute is one of the actual controversies between the parties. The December 9, 1993 memorandum decision

(App. 107) states:

> "On September 5, 1991, there was an order made for summary judgment of dismissal against the plaintiff's case in all cases except number 38270"....On July 19, 1991, the defense filed a motion to strike pleadings and to dismiss in all cases."....."If he [plaintiff] wishes to pursue a case individually as himself, such a case will have to be properly filed and litigated."...."There is substantial doubt whether the court can make any rulings in this case or not.....at any time after June 28, 1991"....."IT IS THEREFORE ADJUDGED that this case is final, that the plaintiff may not proceed in this case or profit from it because to allow that would further condone his unauthorized practice of law."..."IT IS THEREFORE ORDERED that the motions requesting further orders are all denied." [emphasis mine]

The sufficiency of a journal entry claimed to be a final judgment must be tested by its substance, rather than its form. The entry must purport to be an actual judgment conveying the judgment or sentence of the law, as distinguised from a mere memorandum, note, or recital that a judgment has been or will be rendered; Fauber v. Keim, 84 Neb. 167, 120 N.W. 1019 (1909). The sufficiency of the December 9, 1993 order cannot be tested by its form, i.e. "this case is final". First, the December 9, 1993 order (App. 111) states that I can on a future date file a case individually as to myself against the defendants. Under Nebraska law, a conditional judgment is wholly void

because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be; Shaad v. Simms, 240 Neb. 758, 484 N.W.2d 474 (1992). Second, the order is ambiguous. The December 9, 1993 order states that the case is final and at the same time enters an order stating "the motions requesting further orders are all denied". The motions requesting further orders at the time of the December 9, 1993 order in case 38270 were: (1) Regional West Medical Center's motion to strike pleadings and to dismiss filed July 19, 1991; (2) my October 15, 1993 motion to vacate the October 30, 1991 order; (3) my October 15, 1993 motion to annul Defendant's Motion to Dismiss; (4) my November 2, 1993 motion to disqualify Judge Hippe; and (5) my November 19, 1993 motion to compel discovery including discovery concerning Judge Hippe's wife who supervised nursing students who cared for my mother. The order is ambiguous because it states that a future suit may be filed in my individual capacity against the defendants and that the court is uncertain whether it has jurisdiction after June 28, 1991, then on December 9, 1993 it enters an order stating the case is final because the plaintiff is engaged in the unauthorized practice of law and then enters an order denying the defendant's motion to strike and to dismiss which raises the issue of his alleged unauthorized practice of law. Third, there is no order dismissing the amended petition or any petition. It would appear that the December 9, 1993 order by denying my motion to vacate apparently left intact the October 30, 1991 order. However, the

Clerk's Certification (App. 41) clearly shows there was no motion filed requesting any Order nunc pro tunc. Under Nebraska law and federal law, a court cannot set itself in motion, nor has it the power to decide questions except as presented by parties in pleadings and anything decided beyond them is coram non judice and void and is open to collateral attack; National Fire Ins. Co. of Hartford Conn. v. Evertson, 153 Neb. 854, 46 N.W.2d 489 (1951); Reynolds v. Stockton, 140 US 254 [order void under federal law if it is entirely aside from issue raised in record]. According to the Clerk's certification (App. 41), the record does not contain any MOTION filed by the Defendants requesting any Order Nunc Pro Tunc; nor does the record contain any JOURNAL ENTRY indicating that the court heard such a motion. Therefore, the October 30, 1991 order is absolutely void under federal law for lack of notice and hearing. The only order left then is the order sustaining the special appearance on June 28, 1991. Under Nebraska law, an order sustaining of a special appearance is not final; Ranch & Farm Lines, Inc. v. Dressman, 185 Neb. 328, 175 N.W.2d 299 (1970). Obviously, the motion for new trial was directed to a "nonfinal" December 9, 1993 order sustaining a special appearance and therefore the order overruling of the motion for new trial was not a final order; Wicker, supra, 521 N.W.2d at 909. Under Nebraska law, the order sustaining the special appearance became moot when Regional West Medical Center filed its motion to strike pleadings and to dismiss. Under Nebraska law, when a defendant files a special appearance which is later sustained and

then subsequently files a motion to dismiss, the ruling on the special appearance becomes moot; Eliason v. Devaney, 228 Neb. 331, 422 N.W.2d 356 (1988). After a special appearance has been sustained, the procedure to be followed is determined by the plaintiff. It is for him to determine whether or not a new or amended service of summons can be had; Busboom v. Gregory, 179 Neb. 254, 137 N.W.2d 825 (1965). Since Regional West Medical Center had filed a motion to strike and dismiss, I considered this to be a general appearance and the procedure I determined to follow was that the case would proceed to a trial on its merits. Instead, attorney Snowden and Judge Hippe acted under color of law and dismissed the case without prior notice and the opportunity for a hearing. Furthermore, after the December 9, 1993 order, a new summons was served upon Nancy Adams, R.N. and she filed her special appearance on October 11, 1994 and that pleading has not been disposed of by the court and it is my claim that I am entitled under the U.S. Constitution to the opportunity for a hearing on those claims (App. 94) made by Nancy Adams.

The order dated April 30, 1997 shows that Judge Gless took "sua sponte" judicial notice of facts outside the court record in case 44590. The supplemental motion to vacate (App. 78) raised the issue of whether it was proper for Judge Gless to "sua sponte" take judicial notice of facts outside the record in 44590 and dismiss the case without prior notice and the opportunity for a hearing on the propriety of taking judicial notice. The order of the Court of Appeals dated January 21, 1999 affirmed the denial of

the post-dismissal orders including the supplemental motion to vacate. The decision of the Court of Appeals conflicts with the decision of this Court in Gardner v. Louisiana, 368 US 157, 7 L.Ed2d 207, 82 S.Ct. 248 (1961) which held that it violates the Due Process Clauses of the U.S. Constitution for a court to take judicial notice of facts outside the record without giving prior notice and the opportunity for a hearing to the party affected. In Gibbes v. Rose Hill Plantation Development Co., 794 F. Supp. 1327 (D.S.C.1992), the court held that where a court acts sua sponte to take judicial notice of facts outside the record, procedural fairness demands an opportunity to be heard on the propriety of taking judicial notice. See also United States v. Garcia, 672 F.2d 1349 (1982) and State v. Linn, 248 Neb. 809, 539 N.W2d 435 (1995).

CONCLUSION

I have clearly shown that the decision of the Court of Appeals does not rest on an adequate and independent substantive state ground of decision.

This Court should take jurisdiction of this case because (1) it is in the public interest to protect the judiciary against a judge who seeks to determine a case for his wife who has a financial interest in the results of the lawsuit and who seeks to enforce an order which resulted from an ex parte conference with the defendants concerning the merits of the case; and (2) a state official should not be allowed to prosecute an individual for contempt of court charges based on statutes that violate the U.S. Constitution.

WHEREFORE, I most earnestly pray before the God in Heaven and before this Court, in the interests of justice and equity, that this most respectable Court will grant my petition for writ of certiorari because (1) it is against the conscience of reasonable persons to allow the court orders of a Judge who had an ex parte conference with defendants concerning the merits and whose wife is the director of the nursing school and who supervised a nursing student in the negligent care of the decedent to be valid under the U.S. Constitution, and (2) the 14th Amendment allows me a hearing to challenge the constitutionality of a state criminal statute when I have been threatened with criminal prosecution by a state official and allows me a hearing on the issues raised by Nancy Adams in her special appearance filed October 11, 1994.

Respectively submitted,

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